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No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

REPLY OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT TO WYOMING MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs
Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

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Wyoming misconstrues the intervention motion filed by Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District (the "Districts"). The Districts have not "nominally" moved to intervene, nor is there anything "nominal" about the Districts' interest in this action. *See* Wyoming Memorandum in Opposition to Intervention at 1. The Districts have a direct and compelling interest in the Big Bend Reach "instream flow" claims that are before the Court. If instream flows claims in the Big Bend Reach of the Platte River are to be considered in this action, the Districts must intervene to protect their interests associated with Federal Energy Regulatory Commission ("FERC") Projects 1417 and 1835.

The Districts note that no other party or potential intervenor party to this action has opposed the Districts' motion for intervention.

ARGUMENT

I. THE "REAL PURPOSE" OF THE DISTRICTS' INTERVENTION MOTION IS TO PROTECT THE DISTRICTS' PROPERTY, REVENUE, AND FEDERAL LICENSE INTERESTS IN FERC PROJECTS 1417 AND 1835 IF BIG BEND REACH INSTREAM FLOW ISSUES ARE CONSIDERED, NOT SIMPLY TO OPPOSE INTERVENTION BY THE TRUST AND AUDUBON

Wyoming's response to the Districts' motion consists basically of characterizing it as "nominal" because the Districts agree that this action is properly limited to the claims raised by the State of Nebraska. The "real purpose" of the Districts' intervention motion is to protect the Districts' property, revenue, and federal license interests in Projects 1417 and 1835 because

- The Districts' property is directly implicated by the instream flow claims that were raised by the Platte River Whooping Crane Habitat Maintenance Trust ("Trust") and the National Audubon Society ("Audubon").
- The Platte River System regulation sought in this action by the Trust and Audubon would have a direct and substantial, if not severe, adverse impact on the operations of Projects 1417 and 1835.
- Such Project operation modifications would adversely affect the Districts' revenues.
- The Districts have license obligations as FERC licensees for Projects 1417 and 1835 which are separate and apart from instream flow claims.

Wyoming's response does not offer either factual or legal argument to dispute the Districts' position. Indeed,

Wyoming fails to mention that in its earlier pleadings it told the Court that if the Audubon's and Trust's Big Bend Reach instream flow issues are to be considered,

> [e]quity also would require the Court to consider whether operation of diversion and storage projects in Nebraska, such as Lake McConaughy (Kingsley Dam) [Project 1417] should be modified to assure delivery of regulated flows for migratory bird habitat.

Wyoming Memorandum in Opposition to Platte River Trust and Audubon Motions for Leave to Intervene, at 5-6.

Wyoming wants the Court to consider modification of the Districts' Project operations when and if Big Bend Reach instream flow issues are considered, but does not want the Districts to be parties to that consideration. Such a result would be patently unfair to the Districts and wholly unsupported by the principles which guide intervention decisions. Moreover, denying intervention to the Districts would deprive the Court of the Districts' experience and expertise with respect to the operation of the very Projects Wyoming states that the Court would have to consider.

II. THE STATE OF NEBRASKA CANNOT ADEQUATELY REPRESENT THE DISTRICTS' INTERESTS IN THIS ACTION BECAUSE THE STATE DOES NOT HAVE THE DISTRICTS' FEDERAL LICENSE OBLIGATIONS OR PROJECT OPERATION EXPERIENCE

Wyoming offers no basis for its bald assertion that the State of Nebraska will adequately represent the Districts' interests *parens patriae*. Wyoming Memorandum in Opposition to the Districts' Intervention at 2-3.

The instream flow claims raised by the Trust and Audubon have a direct and substantial impact on the operations of the Districts' Projects 1417 and 1835. Wyoming already has stated

> [b]ecause of its location between the Wyoming-Nebraska State line and the habitat area, *no "regulated flows"* delivered at the state line from Wyoming *could reach the habitat area without passing through Lake McConaughy* (1.9 million acre feet). (Emphasis added.)

Wyoming Memorandum in Opposition to Platte River Trust and National Audubon Society Motion for Leave to Intervene at 6, n. 4. In other words, Wyoming recognizes that the instream flow regulation sought by the Trust and Audubon amounts to a *de facto* regulation of the Districts' Projects.

In *New Jersey v. New York*, 345 U.S. 369, 373 (1953), this Court recognized that the *parens patriae* doctrine does not apply where a party has "some compelling interest in his own right, apart from his interest in a class with all citizens and creatures of the State, which interest is not properly represented by the State." The Districts have a compelling interest in the operation and regulation of their Projects. The Districts have a compelling interest in the revenues derived from Project operations. The Districts have a compelling interest in fulfilling their federal licensee obligations to operate the Projects in accordance with their licenses. These interests are unique with respect to the interests of other Nebraska water users and citizens.[1]

[1] Wyoming contends that the Court's denial in 1935 of the intervention request filed by the Platte Valley Public Power and Irrigation District ("Platte Valley") should govern the Districts' intervention request in this action. Wyoming Memorandum in Opposition to the Districts' Intervention at 4-5. Wyoming's position is inconsistent. The Court's 1935 decision regarding Nebraska Public Power District's predecessor in interest, Platte Valley, is dispositive only if the legal and factual issues before the Court in 1935 are the same issues currently before the Court. But Wyoming agrees that the Big Bend Reach instream flow issues are new and different issues than the issues before the Court in 1935. Wyoming Memorandum in Opposition to Districts' Intervention at 3. If the issues are different, (and Wyoming agrees that they are), the 1935 decision is not relevant to the Court's current consideration of the Districts' intervention motion. *See, e.g., Mo-Kan Pipeline Co. v. United States*, 312 U.S. 502 (1941).

The Districts recognize Wyoming's strong interest in confining the issues in this action to matters that actually are in dispute between Nebraska and Wyoming. The Districts do not disagree with Wyoming on this point. But, if Big Bend Reach instream flow issues nonetheless are to be considered in this action, the Districts must be participants. The Districts' interests in the Big Bend Reach instream flow issues could not be represented adequately by any of the existing parties. If the Court decides to address the Big Bend instream flow claims raised by the Trust and Audubon, the Districts should be permitted to speak for themselves and to protect their own interests.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Districts' Brief in Support of Intervention, Wyoming's opposition to the Districts' intervention should be rejected and the Districts should be granted leave to intervene if the Court decides to consider instream flow issues for the Big Bend Reach of the Platte River.

Respectfully submitted,

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs
Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

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ANSWER

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NEBRASKA'S ANSWER TO WYOMING'S COUNTERCLAIM

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

June 19, 1987

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Defendant.

NEBRASKA'S ANSWER TO WYOMING'S COUNTERCLAIM

Pursuant to the Court's order of April 29, 1987, the State of Nebraska answers the State of Wyoming's counterclaim as follows:

1. The allegation of paragraph 1 is admitted.

2. The allegations that Nebraska has intentionally circumvented and violated the Decree, and continues to do so, is denied. Specifically, Nebraska denies:

a. That it has demanded natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the present beneficial use requirements of lands entitled to water from said canals;

b. That it has demanded natural flow and storage water from sources above Tri-State Dam and by-passed or diverted it for uses below Tri-State Dam that are not recognized or authorized by the Decree;

c. That it has used or is using its share of Glendo Reservoir water outside the basin of the North Platte River in western Nebraska, that it has or is using Glendo water for uses other than irrigation, and that Glendo water has or is being used as a substitute for storage water previously available under permanent arrangements.

3. Each allegation of paragraph 3 is denied.

4. Each allegation of paragraph 4 is denied.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Answer to Wyoming's Counterclaim were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 28, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 19th day of June, 1987 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Andrew F. Walch
Land & Natural Resources Division
United States Department of Justice
Post Office Box 7415
Washington, D.C. 20004

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Duane Woodard
Colorado Attorney General
Department of Law
1525 Sherman Street, Third Floor
Denver, Colorado 80203

Charles N. Woodruff
Moses, Wittemyer, Harrison
and Woodruff, P.C.
102 Walnut Street, Suite 300
Boulder, Colorado 80302

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037

Tom Watson
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Edward Weinberg
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554